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U.S. PATENT AND TRADEMARK OFFICE
BOARD OF PATENT APPEALS
AND INTERFERENCES

The opinion in support of the decision being entered today was *not* written for publication and is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte AMY L. FLETCHER, DAVID ARTHUR KUEN, ROBERT
LEE POPP, JACK L. COUILLARD, JOSEPH D. COENEN,
CHRISTOPHER PETER OLSON and SHAWN A. QUERESHI

Appeal No. 2006-1769
Application No. 09/784,292
Technology Center 3700

ON BRIEF

Before FRANKFORT, NAPPI and HORNER, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134(a) from the examiner's final rejections of claims 1-40, all of the claims pending in the application.

We affirm the Examiner's rejections.

BACKGROUND

The appellants' invention relates to an absorbent garment 20 having a chassis 32 and a pair of removable side panels 34. The chassis 32 includes a front region 22 and a back region 24. The side panels 34 are releasably connected to the front and back regions 22, 24, such that the side panels 34 combine with the chassis 32 to define a waist opening 50 and two leg openings 52. Each side panel 34 includes a waist end edge 72 and a leg end edge 70. The waist end edge 72 is relatively straight across in the transverse direction while the leg end edge 70 has a curvature, such that the waist end edge 72 is non-parallel with the leg end edge 70 when the side panels 34 are in a laid-flat configuration. See for example, Figures 4-6 of the application's drawings. In one embodiment, the side panels comprise a wipe material. Independent claims 1, 21, and 34 and dependent claims 5 and 38 are representative of the subject matter on appeal, and a copy of these claims can be found in the appendix to the appellants' brief.

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The examiner relies upon the following as evidence of unpatentability:

Wallach (Wallach)	4,944,734	Jul. 31, 1990
Kuen (Kuen '162)	5,304,162	Apr. 19, 1994
Keuhn, Jr. <i>et al.</i> (Keuhn, Jr.)	5,374,262	Dec. 20, 1994
Kuen (Kuen '789)	5,423,789	Jun. 13, 1995
Yeo (Yeo)	5,509,913	Apr. 23, 1996
Ygge <i>et al.</i> (Ygge)	5,549,593	Aug. 27, 1996
Sauer (Sauer)	5,624,428	Apr. 29, 1997
LaFortune <i>et al.</i> (La Fortune)	5,669,901	Sep. 23, 1997

The following rejections are before us for review:

1. The examiner has rejected claims 1-2, 5-12, 14-21, 23, 25, 27, 29, 30, 34 and 36-39 under 35 U.S.C. § 103(a) as being unpatentable over Kuen '162 in view of Keuhn, Jr. and Sauer.
2. The examiner has rejected claims 13, 31-33 and 40 under 35 U.S.C. § 103(a) as being unpatentable over Kuen '162, Keuhn, Jr. and Sauer, as applied to claims 10, 21 and 34, and further in view of Yeo and Wallach.
3. The examiner has rejected claims 3 and 35 under 35 U.S.C. § 103(a) as being unpatentable over Kuen '162, Keuhn, Jr. and Sauer, as applied to claims 1 and 34, and further in view of Kuen '789.

4. The examiner has rejected claim 4 under 35 U.S.C. § 103(a) as being unpatentable over Kuen '162, Keuhn, Jr. and Sauer, as applied to claim 1, and further in view of LaFortune.
5. The examiner has rejected claims 22, 24, 26, and 28 under 35 U.S.C. § 103(a) as being unpatentable over Kuen '162, Keuhn, Jr. and Sauer, as applied to claim 21, and further in view of Ygge.
6. The examiner has provisionally rejected claims 1-2, 6, 10, 11, 17, 19, 21, 30, 34, and 35 under the judicially-created doctrine of obviousness-type double patenting as being unpatentable over claims 1-16, 20-26, 28-45, and 48-51 of co-pending Application No. 10/032,383.

Rather than reiterate in detail the conflicting viewpoints advanced by the examiner and the appellants regarding this appeal, we make reference to the examiner's answer (mailed May 19, 2005) for the examiner's complete reasoning in support of the rejection and to the appellants' brief (filed April 7, 2005) and reply brief (filed July 15, 2005) for the appellants' arguments.

OPINION

In reaching our decision in this appeal, we have carefully considered the appellants' specification, claims 1, 5, 21, 34, and 38, the applied prior art, and the respective positions articulated by the appellants and the examiner. As a consequence of our review, we make the determinations that follow. It is our view that, after consideration of the record before us, the claimed invention would have been obvious to one of ordinary skill at the time of the invention based on the evidence relied upon by the examiner. Further, because the appellants fail to present arguments rebutting the outstanding obviousness-type double patenting rejection in their briefs, we affirm this rejection.

I. Obviousness Rejection

A. Independent Claims 1, 21, and 34

In the rejection of independent claims 1, 21, and 34, the examiner has determined that Kuen '162 discloses a chassis (22), side panels (40), fastening components (56), mating fastening components (42, 44), and seams formed by the fasteners that run from the waist opening to the leg openings.

The examiner has determined that the device of Kuen '162 includes all of the claimed structure recited in claims 1, 21, and 34 except for the side panels each having a waist edge nonparallel with

the leg edge when the first and second side panels are in a laid flat configuration. Rather, the side panels (40) of Kuen '162 each have waist and leg edges that are parallel in the laid flat configuration. (Examiner's Answer, p. 6). Although Kuen '162 discloses that the material of the region (50) of each side panel (40) may be rectangular in shape, the examiner notes that the reference further teaches, "other shapes are also possible." (Examiner's Answer, p. 6; see also Kuen '162, col. 5, lines 59-63).

The examiner turned to Keuhn, Jr. and Sauer for disclosure of certain "other shapes" for the side panels. With respect to Keuhn, Jr., the examiner pointed to the embodiment of Figure 6 which shows a side panel (64) formed from or attached to the backing sheet 24 of chassis (62) in which the portion of side panel (64) extending from chassis (62) has a curved leg edge that would be nonparallel to the panel waist edge in a laid flat configuration. (Examiner's Answer, page 6). The examiner further relies on Keuhn, Jr. to show that panel members that are releasably connected on both ends (as shown in Figure 1) and panel members that are permanently connected to the back waist region but releasably connected to the front waist region (as shown in Figure 6) are interchangeable. (Examiner's Answer, p. 6).

Similarly, with respect to Sauer, the examiner pointed to the teaching in the reference that the side panel (46) may have any size and shape which provides the desired expansion of the absorbent article (20), including triangular and elliptical shapes, in which the waist edge would not be parallel to the leg edge when in a laid flat configuration. (Examiner's Answer, p. 6, see also Sauer, col. 9, lines 1-5).

With regard to claims 1, 21 and 34, the examiner has determined that it would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains to make an absorbent article, such as that taught by Kuen, having side panels in a shape other than rectangular, such as triangular or elliptical, in view the teachings of Keuhn, Jr. and Sauer, such that the panel waist edge is nonparallel to the leg edges when in a laid flat configuration.

The appellants contend that Kuen '162 fails to explicitly describe any shapes other than rectangular for the strap members (40) and that there is no suggestion or motivation in Kuen '162 that the suggested "other shapes" would include a waist edge that is non-parallel with a leg edge. (Appellants' Brief, p. 5).

The appellants further argue that because the strap members (40) in Kuen '162 rest on a wearer's hips, the leg end edge of the strap members does not extend down to a wearer's legs, whereas the

applicants' side panels extend from a wearer's hips down to the wearer's legs to allow the leg openings to conform about a wearer's legs. (Appellants' Brief, p. 5). The appellants argue that there is no motivation in Kuen '162 to modify the leg edge of the strap members to conform about a wearer's legs.

With regard to the appellants' argument that there is no motivation in Kuen '162 to modify the leg edge of the strap members to conform about a wearer's legs, we find that no such showing of motivation is required to reject the independent claims because none of claims 1, 21, and 34 require the leg edge of the panel member to conform about a wearer's legs. Rather, claims 1 and 21 recite that the side panels combined with the chassis define first and second leg openings.¹ We find that the strap members (40) of Kuen '162 combine with the chassis (22) to define a waist opening and first and second leg openings. (See Kuen '162, Figure 1).

We also disagree with the appellants' position that because the strap members (40) in Kuen '162 rest on a wearer's hips, the leg end edge of the strap members does not extend down to a wearer's legs. We determine the scope of the claims in patent applications "not solely

¹ Claim 34 requires only that the chassis partially define a waist opening and first and second leg openings. The side panels of claim 34 each include a substrate with mating fastening components that extend from the waist opening to their respective leg openings.

on the basis of the claim language, but upon giving claims their broadest reasonable construction ‘in light of the specification as it would be interpreted by one of ordinary skill in the art.’” *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316, 75 USPQ2d 1321, 1329 (Fed. Cir. 2005) (quoting *In re Am. Acad. of Sci. Tech. Ctr.*, 367 F.3d 1359, 1364, 70 USPQ2d 1827, 1830 (Fed. Cir. 2004)). We interpret the term “leg edge” to be that edge of the panel member that, when combined with the chassis, forms the leg opening. (See specification, page 16, lines 12-14). Further, we find that the leg end edge of the panel members can rest on the wearer’s hip or anywhere else along the wearer’s leg. This interpretation finds support in the specification, which describes the side panels (34) to “include the portions of the training pant 20 which, when worn, are positioned on the hips of the wearer.” (Specification, page 16, lines 3-5). Based on this interpretation, we find that the strap members (40) of Kuen ‘162 have leg edges.

With regard to the interchangeability of straps that are releasably connected on both ends with straps that are permanently connected on one end and releasably connected on the other end, the appellants argue that it is only the permanently connected area at the back waist region that derives any benefit from non-parallel strap member edges. The appellant describes the benefit as a larger bond area for a stronger,

more permanent connection between the strap member and the back waist region. The appellants noted that in the embodiment of Figure 1 of Keuhn, Jr., in which both ends of the strap member are releasable, the strap member is shown as having parallel waist and leg edges. (Appellants' brief, pp. 6-7).

We disagree with the appellants' position. In the embodiment of Figure 6, Keuhn, Jr. describes that the strap member (64) adjacent the back waist section (29) can be formed merely from the backing sheet (24) of the shell (62). In this case, there would be no need for a "larger bond area" as argued by the appellants because the strap would be simply an extension of the backing sheet such that there is no bonding of the strap member to the shell. As such, the embodiment of Figure 6 of Keuhn, Jr., which shows a curved area on the leg edge of the strap member (64), would not necessarily require a larger bond area as asserted by the appellants.

With regard to the teaching of elliptical or triangular strap members in Sauer, the appellants argue that the waist and leg edges of the strap members are only non-parallel when one end of the strap member is permanently attached to the chassis, as is shown in Sauer. As such, the appellants argue that Keuhn, Jr. and Sauer fail to disclose or suggest any interchangeability between parallel and non-parallel waist and leg edges of strap members when both ends of the strap

members are releasably connected to the chassis. (Appellants' Brief, p. 7). In their reply brief, the appellants further argued that the permanently connected areas in Keuhn, Jr. and Sauer, benefit from a larger bond area or surface area connection for a stronger, more permanent connection between the strap member and the back waist member, whereas, a less permanent, releasable connection between the strap member and front waist region is suitably provided by a strap member having parallel waist and leg edges. (Appellants' Reply Brief, p. 3).

We disagree with the appellants' positions. With regard to the argument that the permanently connected area in Sauer benefits from a larger bond area connection for a stronger, more permanent connection between the strap member and the back waist member, this argument does not hold true when one considers the elliptical-shaped strap member taught by Sauer. In that embodiment, each end of the elliptical-shaped strap member would have a bond area of the same size, and the center of the strap member would be larger than the ends. As such, the permanently attached end would have a bond area the same size as the refastenable strap end, just as in the rectangular-shaped strap embodiment. In contrast to the rectangular-shaped strap embodiment, however, in the elliptical-shaped strap embodiment, the waist edge and the leg edge would be non-parallel.

Further, appellants provide no basis or evidence to support their position that a releasable connection would not benefit from a larger connection area. For example, a larger connection area would ostensibly require a greater force to release the strap member from the chassis. In certain circumstances where it is anticipated that the wearer is going to be active, such greater force may be warranted to prevent the strap member from being accidentally disengaged from the chassis by movement of the wearer.

Based on the reasons set forth in the appellants' brief and reply brief, they contend that a *prima facie* case of obviousness has not been established because the cited references fail to provide any suggestion or motivation to modify the references or to combine reference teachings to achieve a garment having side panels releasably connected to front and back panels wherein the side panels each have a waist edge that is non-parallel with a leg edge when the side panels are in a laid flat configuration. (Appellants' Reply Brief, pp. 3-4).

In order to determine whether a *prima facie* case of obviousness has been established, we considered the three factors set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 17 (1966), viz., (1) the scope and content of the prior art; (2) the differences between the prior art and the claims at issue; and (3) the level of ordinary skill in the art. We have set forth above our reading of the scope and content of Kuen

'162, Keuhn, Jr., and Sauer, which form the prior art. We also considered the requirement for a *prima facie* case of obviousness, as recently re-stated in *In re Kahn*, 441 F.3d 977, 78 USPQ2d 1329 (Fed. Cir. 2006), of a showing of a “teaching, suggestion, or motivation” to modify or combine the prior art teaching.

For the reasons discussed below, we find that a person of ordinary skill in the art, possessed with the understandings and knowledge reflected in the prior art, and motivated by the general problem facing the inventor, would have been led to make the combination recited in the claims.

“In considering motivation in the obviousness analysis, the problem examined is not the specific problem solved by the invention but the general problem that confronted the inventor before the invention was made. *In re Kahn*, 441 F.3d 977, 988, 78 USPQ2d 1329, 1336 (Fed. Cir. 2006) (citations omitted). In this case, the general problem to be solved was to make a pant-like absorbent garment that avoided the problem of having to don or check the status of the garment by sliding it on and off the wearer while providing an improved fit and appearance.

Kuen '162, Keuhn, Jr., and Sauer each address this problem. We find that one skilled in the art at the time of the invention would

have looked to these references to solve the general problem facing the inventor.

We further find that there is sufficient motivation to combine these references to render the claimed invention obvious. Kuen '162 discloses all of the elements of claims 1, 21, and 34, except for an explicit disclosure of panel members each having a waist edge that is non-parallel with a leg edge when the side panels are in a laid flat configuration. Kuen '162 provides, however, an explicit suggestion to use strap members having a region with shapes other than rectangular. (See Kuen '162, col. 5, lines 59-63).

Keuhn, Jr. teaches the interchangeability of a strap having both ends refastenable with a strap having one end permanently attached to the chassis and another end refastenable to the chassis. (See Keuhn, Jr., col. 9, lines 24-34). Both Keuhn, Jr. and Sauer disclose garments having straps with shapes other than rectangular, and more specifically, shapes in which the waist edge is non-parallel to the leg edge when in a laid flat configuration. (See Keuhn, Jr., Figure 6 and Sauer, col. 9, lines 1-5).

A person of ordinary skill in the art at the time of the invention and confronted with the general problem faced by the appellants would have been motivated to apply the teachings of different strap member

shapes disclosed in Keuhn, Jr. and/or Sauer to the garment of Kuen '162 in view of the suggestion in Kuen '162 to use strap members of different shapes. We thus conclude that based on these teachings of the prior art, a person having ordinary skill in the art at the time of the invention would have viewed the subject matter of claims 1, 21 and 34 as a whole to have been obvious in view of the prior art.

B. Dependent Claims 5 and 8

With respect to dependent claims 5 and 8, the examiner interpreted the claim limitation “wipe material” as including a cloth or paper because such materials are capable of use as a wipe. The examiner noted that Kuen '162 discloses that the side panels are made of a cloth material. (Examiner’s Answer, p. 5, see also Kuen '162, col. 10, line 50 – col. 11, line 52). As such, the examiner rejected these dependent claims as obvious over Kuen '162 in view of Keuhn, Jr. and Sauer.

The appellants argue that their use of the term “wipe” refers to a well-known term of art meaning absorbent wipes often used in conjunction with the changing of a soiled absorbent garment. (Appellants’ Brief, p. 8). In the reply brief, however, the appellants do not similarly limit their interpretation of “wipe material” to “absorbent” wipes. Rather, the appellants’ assert, “the term ‘wipe

material' is a term of art that is understood by those skilled in the art to refer to an article that is used for wiping a wearer's skin during the changing of a soiled absorbent garment." (Appellants' Reply Brief, p. 4).

We affirm the Examiner's rejection in view of the usage of the term "wipe material" in the specification. We determine the scope of the claims in patent applications by giving claims their broadest reasonable construction in light of the specification, as it would be interpreted by one of ordinary skill in the art. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316, 75 USPQ2d 1321, 1329 (Fed. Cir. 2005).

The only discussion of a "wipe material" in the specification is as follows,

In an alternative embodiment of the invention, the side panels 34 can include a wipe material, or material that renders the side panels 34 suitable for use as wipes. Thus, when a care giver [*sic*, caregiver] changes a wearer's disposable absorbent garment, the side panels 34 can be used as wipes rather than requiring a separate package of wipes.

(Specification, p. 31, lines 6-9).

We find that based on this description the term "wipe material" would be interpreted by one skilled in the art to mean any material that

is suitable for wiping a wearer's skin during the changing of a soiled absorbent garment. This could include materials such as cloth or paper.

The appellants have not provided evidence demonstrating why the cloth material disclosed in Kuen would not be suitable for wiping a wearer's skin during the changing of a soiled absorbent garment. The appellants contend that the term "wipe material" has a special meaning in the art, but the meanings provided by the appellants do not exclude the cloth material disclosed in Kuen. A cloth material, such as that described in Kuen '162, is absorbent and is suitable for wiping a wearer's skin during the changing of a soiled absorbent garment. As such, we affirm the examiner's rejection of claims 5 and 38.

C. Dependent Claims 2-4, 6-20, 22-33, 35-37, 39 and 40

The appellants did not separately argue the patentability of these dependent claims. Rather, they relied on their arguments of patentability for independent claims 1, 21, and 34. Finding no argument for the separate patentability of these claims, we agree with the examiner (answer, page 3) that they should be considered to fall with independent claims 1, 21, and 34. As such, because we affirm the examiner's rejection of the independent claims, we also affirm the rejection of these dependent claims.

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II. Obviousness-type Double Patenting Rejection

The examiner has provisionally rejected claims 1-2, 6, 10, 11, 17, 19, 21, 30, 34, and 35 under the judicially-created doctrine of obviousness-type double patenting as being unpatentable over claims 1-16, 20-26, 28-45, and 48-51 of co-pending Application No. 10/032,383. The appellants did not present arguments rebutting the outstanding obviousness-type double patenting rejection in their briefs. As such, we affirm this rejection.

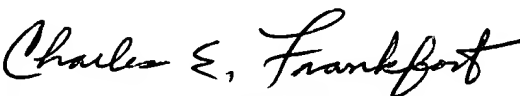
CONCLUSION

To summarize, for the reasons set forth above, we affirm the rejection of claims 1-40.

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No time period for taking any subsequent action in connection
with this appeal may be extended under 37 CFR § 1.136(a).

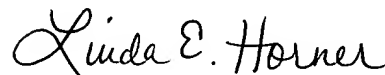
AFFIRMED



CHARLES E. FRANKFORT)
Administrative Patent Judge)



ROBERT E. NAPPI)
Administrative Patent Judge)



LINDA E. HORNER)
Administrative Patent Judge)

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